In the Supreme Court of the United States.

OCTOBER TERM, 1900.

THE UNITED STATES, PETITIONER, v. E. A. MORRISON & SON. } No. 15.

THE UNITED STATES, PETITIONER, v. H. WOLFF & CO. } No. 16.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

SUPPLEMENTAL BRIEF FOR PETITIONER FILED UNDER LEAVE GIVEN AND QUESTIONS FRAMED BY THE COURT.

Following the questions to which the court has directed the attention of counsel by the order entered May 28, 1900—

I.

What is the precise scope and effect in this court of the stipulation of March 18, 1897, respecting the character and alternative classification of the merchandise whose proper classification is at issue?

The stipulation (p. 34, Morrison record; p. 6, Wolff record), after agreeing upon the make-up of the two records here, *mutatis mutandis*, concludes with the following paragraph:

> And it is further stipulated that the merchandise herein involved was in fact beads, and was in fact threaded or strung at the time of its importation, and was thereby excluded from classification under paragraph 445, act of October 1, 1890, and that unless this court shall hold that it was dutiable under paragraph 454 of the said act as imitations of precious stones, etc., it was properly classified by the collector of customs under paragraph 108 of the said act as manufactures of glass not specially provided for.

The agreement upon the composition of the record has an important bearing upon the scope of the stipulation, because analysis of the various portions of the record in the circuit court of appeals, which are included in the record here, shows exactly what merchandise and what inquiries are to be considered here. Therefore it is important to clear up the matter at the outset and show just what articles and questions are now actually before the court.

Investigating the stipulation, then, with that object in view, it is evident that in the Morrison case two entries were involved covered by one protest; that certain "masses mat jewel stones," which were loose beads, unthreaded or unstrung, were eliminated from the case, the determination regarding them being in favor of the importers, and that the remainder of the goods were glass beads threaded or strung upon threads or cords. (Mor-

rison record, pp. 1–3.) The testimony shows that in one of the two importations in the case there were "two thousand tiger-eyes, red," all the other articles therein being the "masses of mat jewel stones" of different colors; that in the other importation (of Morrison & Son) there were "cat's-eyes, tiger-eyes," and "masses of mat jewel stones, garnet, medium blue, and straw." (Morrison record, p. 4.) From this it is clear that the Morrison case involved cat's-eyes; it seems also to have involved "mat jewel stones," which were not loose beads unthreaded or unstrung, like the portions thereof decided in the importers' favor.

The Wolff record (pp. 1–3) shows that there were several importations which are called variously "beads in bunches," "certain strung beads," and are identified as the wax beads and imitation pearls of Exhibit 4 of the case on page 5 of the Morrison record. It should be noted, as bearing on the next question propounded by the court, that the decision of the General Appraisers in the Wolff case finds that the goods are of the same character as those which were the subject of decision on protests of Schmalhausen and others, and in the decision on these latter protests it is stated that "the goods here subject of protest consist of beads made of glass, or of which glass is the component material of chief value, strung upon threads or cords for the purpose of assorting or for convenience in handling or transportation." (Wolff record, pp. 3, 4.) But that decision of the General Appraisers on the Schmalhausen protest is not to be taken as incorporated in the facts of the present cases, so as to

make the beads here, in effect, unthreaded or unstrung, and thus tend to set aside the agreement of the stipulation that paragraph 445 of the act of 1890 does not apply to these articles, or to overcome the definite finding of the circuit court of appeals, whose conclusion was in favor of the importers, that the principal use of these beads was for trimming. This point will be referred to hereafter.

I find no Exhibit 1 in these records; it probably referred to the articles as to which the importers were successful and which therefore dropped out of the case. Exhibit 2 of the Morrison record is a representative sample or samples of the cat's-eyes or tiger-eyes. Exhibit 3 was made up of representative samples of the "mat jewel stones" of various colors, which, being of garnet, medium blue, and straw colors, and referred to on page 18 of the Morrison record as including imitation garnets, aquamarines, moonstones, and topazes, seems to refer to articles still in the case and now before the court. Exhibit 4 represented the wax beads of Wolff & Co., which were covered by four entries and were the imitation pearls involved in the case. (See Morrison record, pp. 4, 5; Wolff record, pp. 1–4.) Exhibits 2, 3, and 4 are now in the custody of the marshal of the court.

An inspection of the exhibits shows that excepting the "pearls" they are all small discs of glass, flat on one side, rounded on the other, with holes through them, not cut at all, and many of them not brilliant or polished in surface, but having a rather dulled look like ground glass.

Exhibit 2—the cat's-eyes—is a string of the beads. Exhibit 3—the variegated beads—is not now a string of beads, but it is not to be deduced from that fact that the various beads of which these are samples were imported loose. In Exhibit 3 are two pale-blue beads which presumably stand for the "aquamarine," two yellowish-brown beads which so stand for the "topaz," and two pale-greenish beads which apparently are the "moonstones." The only remaining bead is of a deeper blue shade than the so-called aquamarines, and therefore there is nothing in the exhibit which remotely resembles a garnet, unless the yellowish-brown beads stand for garnets rather than for topazes.

As to the "pearls," a genuine pearl has a sort of natural enamel, and the artificial effect of such luster is more readily imitated than the brilliancy of precious stones. But it requires a distinct effort of the imagination to regard the wax beads as "pearls," and, in short, as to all these articles, the "imitation" lies chiefly in the importers' assertion (in effect) of an intent to imitate. As to Exhibits 2 and 3, certainly no one ever saw the corresponding genuine stones in such form and condition, without imitation of cutting and not *en cabochon*, and in fact there is no real correspondence or similarity.

Exhibit 5 (Morrison record, p. 18) included certain genuine stones, about which Lamont, the lapidary, a witness for the importers, testified (Morrison record, pp. 16–20), namely: Topaz, amethyst, crystal, and crocidolite or cat's-eye. It is worth noting that although Lamont testified that all the stones included in Exhibit

5 were genuine, another witness, Starke, called on behalf of the importers (p. 21), said that the cat's-eye was an imitation.

"Govt.'s Sample, Exhibit A" (p. 24), represented imitation precious stones unset, as used for making imitation jewelry and ornaments, and were further named or described on page 28 as imitation emeralds, rubies, amethysts, diamonds, topazes, and sapphires, which were cut or appeared cut or pressed or faceted; and in the opinion of the witness (Schmalhausen) this condition was universally or generally true as to such imitation precious stones, which he never knew to have holes in them or through them.

It thus appears with tolerable clearness from these records that there are involved in the Morrison case the dutiable classification of (so-called) imitation tiger-eyes or cat's-eyes (Exhibit 2), and of imitation garnets, aquamarines, moonstones, and topazes (Exhibit 3), and in the Wolff case imitation pearls (Exhibit 4). Everything else has disappeared from the controversy; the "mat jewel stones," which were loose beads, unthreaded or unstrung (see General Appraisers' decision, Morrison record, p. 3), and the black glass beads unstrung, and the glass ornaments without holes for stringing, referred to in Judge Wheeler's opinion. (Morrison record, p. 32.)

As to all the articles remaining in the case, it was found as fact by the Board of General Appraisers that they were beads made of glass, or that glass was the component material of chief value, and that they were strung on threads or cords. (Morrison record, p. 3;

Wolff record, p. 3.) And as to these articles the circuit court held (Morrison record, p. 32; Wolff record, p. 4) that "these importations are of variegated glass beads strung * * * and hollow glass beads with wax inserted, giving an appearance like pearl strung."

Now, the final point in the scope and effect of the stipulation of March 18, 1897, resides in the exclusion of paragraph 445 of the act of 1890, providing for a duty of 10 per cent on "glass beads, loose, unthreaded or unstrung"—as Judge Wheeler said, "there is no mention of beads strung"—and in the agreement that the question lay solely between paragraph 108 and paragraph 454 of that act, which are as follows:

> 108. Thin blown glass, blown with or without a mold, including glass chimneys and all other manufactures of glass, or of which glass shall be the component material of chief value, not specially provided for in this act, sixty per centum ad valorem.
>
> 454. Precious stones of all kinds, cut but not set, ten per centum ad valorem; if set, and not specially provided for in this act, twenty-five per centum ad valorem. Imitations of precious stones composed of paste or glass not exceeding one inch in dimensions, not set, ten per centum ad valorem.

Judge Wheeler clearly and sensibly strikes the balance between these competing claims when he says:

> The variegated beads strung are manufactures of glass, and, as they were not specially provided for, were properly classified. The wax beads, although they may be imitations of pearls as precious stones, are not composed of glass or paste, but glass and wax, and the wax is what, if anything, constitutes

the imitation. And imitations of precious stones unset are impliedly imitations capable of being set, which these beads are not.

It is pertinent to suggest here, before examining again, as will be done in an appendix, the scientific nature and classification of the various genuine stones and the pearls imitated, that while such stones display a wide range of color and delicate variations of shade, they all present normally a well-defined and characteristic color. Practically, while the importers seek elaborately to bring out a distinguishing nomenclature and call these various bits of glass imitations of "crocidolite," "aquamarine," etc., the circuit court shortly and properly characterized them as merely "variegated glass beads" and "hollow glass beads with wax inserted."

Indeed, the importers' own invoice brings out this point, because when it said "masses of mat jewel stones, garnet, medium blue and straw," it showed that the so-called imitation precious stones, garnet, aquamarine, and topaz were colored bits of glass and could be described by colors merely, which were discriminated in a vague and general way from other shades. The "tiger-eyes" are "red" by the invoice, although the distinguishing color of the genuine stone is a peculiar and beautiful shade of brown, tending, in "cat's-eyes," to a greenish tinge. So far as the term "jewel stones" is concerned, it is shown on page 7 of the Morrison record that this is only an alternative trade name for beads. Beads are called jewels in the trade. "Jewel stones" in the invoice, therefore, is to be taken as meaning and

intended to mean beads rather than imitation precious stones.

The circuit court of appeals found that all the imitation cat's-eyes were used principally in the millinery trade for trimming or for trimming ladies' garments, and that the imitation pearls were used for necklaces or for trimming, and, all the articles having "been long commercially known as beads," and being in fact, "in both popular and commercial language," beads, held that the articles in the two Morrison importations (apparently embracing in their reasoning as well as in their conclusion the Wolff pearls) were in fact imitations of precious stones, and ignored the implication residing in the word "unset" by holding that while the Morrison importations were to be used exclusively for trimming purposes, and were not to be set into ornaments, there was no practical tariff distinction between imitations of precious stones made of glass or paste unset which are intended to be set into articles of jewelry and those imitations which are to be used as ornaments upon ladies' hats or apparel. (Morrison record, pp. 35, 36.) Finding these facts and yet holding this inconsistent view, the court conclude, perhaps with some doubt, that adequate provision seems to have been made for the articles by paragraph 454, and that therefore, being thus specially provided for, they do not fall into the general receptacle for glass articles provided by paragraph 108.

The Government argument in the case, of course, challenges this conclusion and the reasoning by which it is reached at every point. (See main Government brief.)

We think that the distinction ignored by the circuit court of appeals is practical and obvious, and not to regard it is to merge such carefully drawn tests of tariff provisions, with the reasons in the nature of the case for defining them, so that both the language and intention of the law are nullified.

II.

The second question is: *When, if at all, might the purposes for which beads were threaded or strung be held not to prevent their classification as beads loose, unthreaded, or unstrung under paragraph 445 of the tariff act of 1890?*

We contend that the inquiry thus suggested can not affect this case, because the stipulation excludes paragraph 445 from consideration. The stipulation says that the "merchandise * * * was in fact beads and was in fact threaded or strung at the time of its importation, *and was thereby excluded from classification under paragraph 445*," etc.

Nevertheless, assuming to go back of this agreement, it must be taken as settled that the importers entered into the same because it was beyond question that these beads were threaded or strung in such a way or for such purpose as to prevent their classification as beads—loose, unthreaded, or unstrung—under paragraph 445. On the oral argument the court's attention was called to the concession of opposing counsel on page 9 of the Morrison record:

> Mr. COMSTOCK. The importer concedes that they were imported upon strings, and that the claim that they were entitled to entry as beads loose, unthreaded, or unstrung is not insisted upon.

Some demur at the argument was made as to the Government's application of this concession, but with what intention or with what effect we can not understand, because the stipulation was entered in both cases and covers all the merchandise.

In the abstract, however, we answer the question of the court with the contention that, whatever the purposes for which beads may be threaded or strung, if threaded or strung they certainly are not entitled to classification as beads "loose, unthreaded, or unstrung," because the one condition is the denial and contradiction of the other, and to investigate the purposes of stringing and to find discriminations leading to the inclusion of strung beads in paragraph 445 would be to ignore the law. The record shows no definite contention as to purpose or use by the importers; their argument is, with the circuit court of appeals, that the use makes no difference; they merely indicate that there may be various uses, or rather that precious stones are sometimes perforated, but substantially hold to the ground that these articles are, in fact; irrespective of use, imitations of precious stones. Nevertheless, we are not unaware of the fact that in the Schmalhausen protests (G. A., 2961; Wolff record, p. 3) the purpose of the stringing there was said to be for "assorting or for convenience in handling or transportation." As was said, however, in a previous portion of this brief, this phrase or description of the Schmalhausen case is not, for manifest reasons, to be engrafted upon the present case; and in that decision and the one to which it refers (G. A., 1876; *In re Steiner et al.*, 66 F. R., 726) the conclusion was in favor

of the collector's assessment of duty at the rate of 60 per cent, as manufactures of glass.

Turning to G. A., 876, the importers claimed that the beads were unthreaded and unstrung, and therefore were dutiable under paragraph 445, and the finding of the board was that part of the merchandise was glass beads strung and the remainder variegated flat glass beads, known as nail-head beads, "fastened upon cards with threads to protect the edges of the beads from being broken and chipped in handling and transportation." Notwithstanding the claim of the importers that the first portion was beads intended to be unstrung after importation, the appraisers held that these were excluded from entry under paragraph 445, but also held that the nail-head beads fastened upon cards with threads were "constructively loose," and that threaded beads and strung beads, being recognized in the trade as synonymous terms, the latter portion of beads was not known commercially as strung beads.

It is not necessary to pursue this distinction, which is not so plain as to be readily conceded, because, as above shown, it is not involved in this case. To ordinary apprehension the terms "loose, unthreaded, or unstrung" seem to require a condition of the articles free from any sort of connection or attachment with any kind of strings. We are also aware that in T. D., 3995 (see p. 18 of the main Government brief), under the provision of an earlier tariff as to pearls, the board held that perforated genuine pearls "merely strung on threads" was only for convenience of transportation and did not change their essential character as pearls not set. The soundness of this

decision, too, might be questioned (although both the question and the law were different from those now under examination), and is not really germane to our inquiry, for the reason already given, although that decision has some bearing on the idea that perforation of genuine pearls for convenient transportation does not, or, rather, did not, necessarily interfere with their character as articles to be strung or otherwise made into jewelry in this country. They were pearls *not set*, perhaps, because pearls, unlike precious stones, in the past sometimes came into the country in that condition to be set. But that notion is not in accordance with recent law, which, under the three last tariff acts, permits no account of the purpose or exact condition of strung pearls. The test is whether they are "strung" or not. Indeed, the decisions show generally that the inquiry as to the purpose of the condition or form in which an importation arrives in this country is not usually allowable and is not really important.

In the case of *Worthington* v. *Robbins* (139 U. S., 337) it was agreed in a statement of facts that "if it would be competent to prove the same," the enamel in controversy was imported by the importers for use in making watch dials, and was in fact so used; but the fact appearing that it was also used for various other purposes, the court declined to classify it for duty as watch materials, since there was nothing to prevent its sale and use for purposes other than the making of watch dials. And the general principle is fairly deduced from this opinion that the classification of imports must be ascertained by

an examination of the articles themselves in the condition in which imported, and should not be referred to the proposed use, or even the actual use, among various possible uses which might be made thereof.

In another case cited in this opinion it appeared that the article in question was only known to the trade and was only used for one purpose, and apparently there were neither various forms in which it might be imported nor various purposes for which it might be used.

Again, the intention and purpose of the importer or the fitness of a certain purpose of an importation are shown not to be the proper test in the case of *Dwight* v. *Merritt* (140 U. S., 213), in which an assessment of duty on antiquated and rusty iron rails as iron bars for railroads or inclined planes was sustained as against the importer's claim that they were mere scrap iron, which it was admitted were not adapted to use as rails nor imported for any such purpose, but which were manifestly imported solely for remanufacture. The final sentence of the opinion is as follows:

> All the various questions of utility and adaptation of the merchandise imported are not supposed to enter into the decision of the collector in determining its dutiable classification, under the rule in *Worthington* v. *Robbins*.

And in *United States* v. *Schoverling* (146 U. S., 76) the intent of the importers to combine the articles in a certain way after importation was not permitted to affect the rate of duty on the articles themselves as imported. (See also *United States* v. *Potts*, 5 Cranch, 284; *Hartranft* v. *Wiegmann*, 121 U. S., 609; *Seeberger* v. *Castro*, 153 U. S., 32.)

So here the test is, Are the beads strung? Perhaps any purpose, whatever it might be, is excluded from consideration, although it is manifest that these strung beads were either manufactured trimmings and ornaments or else strung for necklaces. Certainly general allegations of the importers that the purpose might possibly be to unstring and set in the ordinary forms can not affect the proved and preponderating facts or the stipulation.

It is always to be remembered that the general appraisers found the facts in this case, as it is their function to do in all such cases; that the finding was in general agreement with their findings in similar cases down to recent decisions of the board concerning imitation pearls (see previous brief), and that the definite finding was that these articles were glass beads, manufactures of glass, and, by consequence, were neither unstrung beads nor imitations of precious stones. Upon this point the decision in *In re Steiner et al., supra*, is one of many statements of the principle ruled in this court and in Federal courts below upon the subject, namely:

> A simple question of fact is thus presented where the burden is upon the importers to prove that the importations consist of unstrung glass beads. This question of fact was tried out before the Board of Appraisers, and they have found that the articles in question are manufactures of glass and are not unstrung glass beads. As I recollect the evidence, the only testimony before the board was to the effect that these are strung beads; in fact, a mere ocular examination of them demonstrates that they are strung beads. As there is no evidence to the contrary, the

court would hardly be justified in overruling the decision of the board. If it were a disputed question of fact on evenly balanced testimony, their decision should stand, but as it is, the weight of evidence is clearly on the side of the collector.

The conclusion, then, clearly is that neither, as a general principle, may the possible purpose of making an importation be regarded as against its condition or form at the time of the importation, nor in this case (beyond question) may the possible purposes for which beads are threaded or strung be regarded at any time or under any circumstances so as not to prevent their classification as beads, loose, unthreaded, or unstrung, under paragraph 445 of the tariff act of 1890. Whatever the present condition of the representative samples or exhibits may be, the importations were *strung beads* when they were entered.

III.

The third question is: "*As respects articles which were in fact beads and which were threaded and strung, and were intended to be used for the purposes for which beads are normally used, was it the intention of Congress that such as imitated precious stones and did not exceed one inch in dimensions, and were not set, should be dutiable under paragraph 454 of the tariff act of 1890, and that such as did not imitate precious stones should be the subject of a different classification?*"

The answer to the third question must be in the negative. It involves by its terms the consideration of use or purpose. Congress surely did not mean that strung

beads intended to be used *normally* (which normal purpose or intended use is found as a fact in this case by the circuit court of appeals) should be classified differently according as they might or might not imitate precious stones, or, in the present instance, according as they might or might not roughly and crudely imitate ornamental stones which are alleged to be precious.

The statement of the proposition irresistibly brings us back to the firm conceptions of a limited and definite class of stone, a definite condition as well as size, and a definite quality of workmanship. The provisions and implications of the law are necessary and positive that the imitations should be of *precious stones;* that, the imitated precious stones should not be *beads;* that, not exceeding 1 inch in dimensions (suggesting that a larger size would pass beyond probability as to the originals imitated, and that the *character* and *quality* of the imitations were strictly conceived in the law), they shall not be set, but shall be capable of being set in the usual ways. In other words, the phrase "imitations of precious stones" is no mere general description, loosely and broadly used—bearing in mind always that to whatever extent, in the abstract, a court might regard a controlling purpose plainly shown (if not forbidden by the decisions before cited) to use otherwise than as beads, these articles were beads, were so found to be, was agreed not to be unstrung, and the normal use as beads was determined by the court below. These articles, then, being "beads" and nothing else, and the conditions of paragraph 454 withholding that classification from such of them as might possibly imitate

precious stones, because the perforation and stringing show that, while not set, they are not capable of being set, the inquiry arises, "What articles are meant by imitation precious stones in paragraph 454?"

It is a well-known fact that both precious stones and pearls are wonderfully imitated in Europe by elaborate and costly processes, and are set in coronets, rings, and other usual forms. The finest modern pastes cost a very substantial proportion of the value of genuine stones, and historic and family gems are understood rarely to appear in public, but fine paste substitutes are shown and worn instead. Nor is this art confined to imitations of the greatest jewels, but covers the field commercially, and of course includes stones within the dimensions of paragraph 454. Such are the "imitations" of the act.

But it may be sugggested that these imitation precious stones and pearls are often "set" or strung as necklaces, as the genuiue stones are, which are none the less precious stones. The court will recall that the learned opposing counsel exhibited at the hearing a beautiful necklace of genuine diamonds and sapphires. I think the reply to that suggestion is obvious. Such necklaces are strung on cords, strands, or fine chains of gold, or some other appropriate and valuable metal, but are not "set." "To set," in the jewelry sense, is restricted to the idea of framing or mounting. (See dictionaries.) Such genuine necklaces would be dutiable as "jewelry," under paragraph 452 of the act of 1890, and since that act under paragraph 336 of the act of 1894 and paragraph 434 of the act of 1897. There can be no

doubt on this point under the language of the two latter acts, and surely there can be no reasonable doubt under paragraph 452 of the act of 1890, although that paragraph taxing "jewelry" and "all articles * * * known commercially as 'jewelry,'" includes the words, "whether *set* with coral, jet, or pearls, or with diamonds, rubies, cameos, or other precious stones, or imitations thereof, or otherwise." The act of 1897, in the paragraph corresponding (435) to paragraph 454 of the act of 1890, amplifies "not set" to "not mounted or set." Certainly a necklace of genuine stones is "jewelry" and to be taxed as such, and consequently an imitation thereof is not entitled to entry as as an imitation of precious stones not set. And while such precious stones are not capable of being "set," the finished condition of a necklace as "jewelry" places such an article entirely apart from the meaning and force of the terms "set" and "not set" as applied to precious stones ordinarily, and to the imitations thereof which the law had in mind. This reasoning applies to a finished necklace of genuine pearls or to an imitation thereof. If (formerly) the string of genuine pearls was not a finished necklace, but was merely strung on horsehair or some other filament for convenience of transportation, and so the importer properly escaped classification as "beads" (Schedule M, Duties upon Imports, Rev. Stat., p. 473; T. D., 3995) and obtained classification as "pearls not set" (Rev. Stat., 480), in recent acts such a dilemma does not exist, because, under the somewhat varying expressions of the later acts, genuine pearls are taxed as jewelry when *strung* or set, and are admitted at a

lower rate in their natural state, *not strung* or set. And I know of no decision respecting pearls since the law has been in this form which holds that a stringing merely for transportation relieves from the jewelry classification. Even the distinction of the General Appraisers in the Schmalhausen case, *supra*, respecting sewing on cards, does not seem to have been applied to pearls.

The foregoing leads to the statement that imitation pearls or precious stones strung can not claim an exemption to which the genuine articles strung are not entitled, and rely upon the transportation purpose of the stringing. The importer can not in any case say, "This is not a bead *necklace;* the beads may be unstrung and be made into new and various forms, and therefore they are constructively loose;" and on that suggestion we again call attention to the agreement of the stipulation on the point.

But it is also, at all times, to be remembered that pearls are not precious stones. Not to weary the court with a repetition of the previous brief on that branch of the case, let me submit a few pertinent provisions from the last three tariff acts:

Act of 1890, paragraph 452, speaks of a setting with coral, jet, or pearls, *or* with diamonds, rubies, cameos, or other precious stones; paragraph 453, "pearls, ten per centum ad valorem;" paragraph 454, "precious stones of all kinds, cut but not set, ten per centum ad valorem." If pearls are precious stones, why was not paragraph 453 omitted? Paragraphs 337 and 338 of the act of 1894 show the same juxtaposition and contrast; and in the act of 1897 paragraph 434 provides for precious stones set, pearls set or strung; and paragraph

436 provides for pearls in their natural state not strung or set, while paragraph 435 provides for *diamonds and other precious stones* advanced in condition by cutting, etc. This suggests, further, that a precious stone must be one capable of being "cut," which a pearl is not.

I append to this brief certain material upon the scientific and artistic nature of various stones, with definitions of the terms employed, drawn from well-known authorities.

From the authorities thus given we draw the deductions that the term "precious stones" is not to be used in the loose way in which, with "gems" and "jewels," it is sometimes used, and as synonymous with those terms; that while perhaps some of the stones, imitations of which are involved in this case, such as the aquamarine and topaz, might be classified as semiprecious, no stone properly belongs to the class of precious stones except the diamond, sapphire, emerald, and ruby, which, upon the test of mineralogical characteristics, hardness, tenacity, etc., and of rarity, brilliancy, and value, are at the summit of the series of ornamental stones; that a line must be drawn, and the line just suggested is the only certain and safe one; and that if all valuable, beautiful, and ornamental stones which are not marble, building, or monumental stones, and are comparatively rare, are to be classed in tariff acts as precious stones, there is practically no limit to the articles which may come in under that head.[1] For, as fashion dictates, various inferior stones, such as verde antique,

[1] See in this connection, paragraph 115, act of 1897.

serpentine, jade, bloodstone, malachite, and lapis lazuli, which occur in extensive and massive deposits, are used not only for ornamental purposes in the form of statuary, slabs, etc., but appear frequently in jewelers' shops, set in the ordinary small and carefully worked pieces and in the shape of rings, pins, brooches, etc. Ivory and tortoise shell, as well as coral and other substances, are often classed in the list of valuable or precious articles used for gems or gem work. Amber, an anomalous "stone," like pearls, is very exactly imitated nowadays in celluloid, and doubtless also in combinations of glass similar to the beads before the court, and is used both for necklaces and set into various kinds of jewelry ornaments.

Special provision has in the recent acts been made for manufactures of amber, as well as of the other valuable articles just mentioned. But, if this were not so, would amber be a precious stone because it is prized and valuable, and should imitations of it be permitted to come in under the guise of imitations of precious stones? I think such a question must be answered in the negative; and, equally, that the imitations now before the court, which can be purchased in strings and bunches by the peck (so to speak) on the counters of dry-goods stores and notion stores, should be forbidden to masquerade under this term. The form in which such beads on strings appear, as being intended to be used, or actually used, in the condition of importation, for ornamenting dresses or hats, either by sewing on the fabrics or by being attached to them as a pendant ornament on the one hand, or by wearing as necklaces on the other, can justly make no difference; nor could an alleged intention to unstring

and refabricate make any difference, certainly none in this case, under the stipulation.

Under the act of 1883 bead forms of glass of various shapes, sizes, and colors in imitation of precious stones were returned for duty at 50 per cent under paragraph 396 of that act, whether imported loose or made into ornaments; that is, however imported, because strung beads were of course included under the broader language of that act. The later acts surrendered this claim on unstrung beads only, but, we contend, necessarily remitted strung beads to manufactures of glass, and this is so, although the act of 1883 contained no specific provision for imitation precious stones. In other words, under the succeeding acts if such imitations were pierced but loose they were beads, but specifically entitled to the lower rate of duty; whereas if pierced and strung they were not fit for use as imitation precious stones, and, being beads and manufactures of glass, were taxable under the latter head. (See G. A., 386, and especially the paragraph thereof referring to the act of 1883.)

IV.

CONCLUSION.

Finally, I beg to submit in another form a statement of what the law provides and a construction of the purposes of the provisions.

Paragraph 445 taxes beads loose, unthreaded, or unstrung. The articles before the court are not such beads in fact, as was regularly determined, and the importers by their agreement so admit. Paragraph 454

taxes, *inter alia*, imitations of precious stones composed of paste or glass not exceeding 1 inch in dimensions, not set. These are not such imitations of precious stones, as we think we have shown. They are not the imitations of precious stones which Congress by any practical and reasonable test of facts and language meant to place under this paragraph. Being manufactures of glass, and not being specially provided for in either paragraph 445 or paragraph 454 or elsewhere in the act, they must fall under the provisions of paragraph 108, however general and remote from specific reference its language may be.

Why should Congress make a difference between loose, unthreaded, or unstrung glass beads and glass beads threaded or strung? It may be suggested that two purposes were in view. In the first place, loose glass beads are in a less advanced stage of manufacture and need labor in this country. They are applicable to a wider range of uses. Glass beads strung, and especially glass beads strung as these were, ready for application to their trimming uses at once, are in their completed form of manufacture, and in all cases have a pretty certain destination of use. In this case there is no doubt about that destination. The use is one which, being for personal adornment, falls within the list of luxuries, however moderate and inexpensive a member of that list they may be. Therefore in the difference of taxation Congress had in mind two well-defined principles—the interests of labor in this country and the propriety of a higher taxation on articles of plain and well-defined use for the ornamental and luxurious side of life.

If the learned counsel again calls attention to the claim that the preponderance of the record evidence is in favor of the importers, we respectfully refer the court on that point to our previous brief, showing, we think, that this preponderance is apparent rather than real, depending partly on a witness whose reliability is far from assured, and showing also that the question is largely an abstract one which is not wholly dependent upon the record.

We therefore respectfully submit that these "small brown beads," "variegated glass beads," "glass and wax beads," "hollow glass beads, with wax inserted," all of them strung, are not entitled to classification as imitations of precious stones, but should be held to be dutiable at the rate of 60 per cent ad valorem, as manufactures of glass, under paragraph 108 of the act of 1890.

We respectfully submit that the decision of the circuit court of appeals should be reversed, and the decision of the circuit court sustaining the decision of the Board of Appraisers and the collector should be reinstated and affirmed.

HENRY M. HOYT,
Assistant Attorney-General.

APPENDIX.

Definitions; scientific and artistic authorities.

It is desirable to make the inquiry concerning the nature of the corresponding genuine stones thorough, and accordingly I give here an abstract of dictionary and encyclopædia references thereto.

1. (*a*). The Standard Dictionary, not containing the term cat's-eye, speaks of crocidolite generally as a hydrous silicate—fibrous, silky, and blue or green in color, and adds: "2. A yellow alteration product of this silicate used as a gem stone. Called also tiger-eye."

(*b*). The *Century* says, *sub nomine* "cat's-eye":

> 1. A variety of quartz, very hard and semitransparent, and from certain points exhibiting a yellowish opalescent radiation or chatoyant appearance, whence the name. ["Chatoyant. * * * I. Changing in luster or color, like a cat's-eye in the dark. * * * II. A kind of hard stone or gem having, when cut and polished, a chatoyant luster; cat's-eye."] Also called sunstone. The same name is also given to other gems exhibiting like chatoyant effects, more especially to chrysoberyl, which is sometimes called the true cat's-eye.

Under the word *crocidolite* the *Century* says:

> * * * A mineral consisting principally of silicate of iron and sodium, occurring in asbestos-like

fibers of a delicate blue color, and also massive. * * * Also called blue asbestos. The name is also given to a siliceous mineral (tiger-eye) of beautiful yellow color and fibrous structure, much used for ornament, which has resulted from the natural alteration of the original blue crocidolite of South Africa.

A beautiful series of the * * * so-called crocidolite cat's-eyes (also called tiger's-eyes) * * * really a combination of crocidolite fibers coated with quartz. This encasing renders it harder than unaltered crocidolite. (Pop. Sci. Mo., XXVIII, 828.)

2. The *Century* says that aquamarine is "the finest beryl, so called from its bluish or sea-green tint;" and under the heading *beryl*, "a colorless, bluish, pinkish, yellow, or more commonly green mineral, occurring in hexagonal prisms. The precious emerald is a variety which owes its beauty of color to the presence of a small amount of chromium. See *emerald*. Aquamarine is a pale-green transparent variety, also used as a gem, though not highly prized. Beryl is a silicate of aluminium and beryllium." * * *

The *Standard* defines aquamarine as a bluish or greenish variety of precious beryl, and beryl as a vitreous to resinous mineral of different colors. "When transparent it is used as a precious stone. Aquamarine and emerald are gem varieties."

3. Garnets include many varieties, the aluminum garnets with various subdivisions, the iron garnets and the chromium garnets, and some of all these varieties are cut as gems, the lighter and clearer ones being called hyacinths, the yellowish and reddish, jacinths, and the deep, clear red, precious garnets, the latter being called carbuncles when cut *en cabochon*. This is an abstract from the *Standard* on the word.

The *Century* speaks of it as "a common mineral species

embracing many varieties which * * * differ in composition and hence also in color, specific gravity, and fusibility." "Garnets are commonly found in gneiss, mica schist, granite, and hornblende rocks," "in distinct embedded crystals belonging to the isometric system." "The precious garnet is transparent and deep red, * * * and is prized as a gem." * * *

4. *Moonstone.* *Century:* "A variety of feldspar, which, by reflected light, presents a delicate pearly play of color. * * * It is often cut and used for ornamental purposes." *Standard:* "A whitish chatoyant feldspar * * * valued as a gem stone."

5. *Topaz.* *Century:* "A mineral of a vitreous luster, transparent or translucent, sometimes colorless, often of a yellow, white, green, or pale blue color." *Standard:* "A transparent to translucent, usually white to yellow * * * aluminum fluosilicate."

6. The definitions of *pearl* in both dictionaries refer to its marine and animal origin and to its chemical nature, consisting chiefly of calcium carbonate. The *Century* dictionary shows that the range of color is very great, from the satiny and silvery white tint, which is most desired, through gray, pink, yellow, purple, and smoky brown to black.

It will be worth while also to examine the definitions of the three terms, *gem*, *jewel*, and *precious stone*, which are often used as synonymous terms, and learn whether they are not, however, capable of practical and exact discriminations.

> (*Standard.*) "*Gem:* A precious stone usually when cut and finished ready for wearing or setting as an ornament, as the diamond, ruby, and sapphire; a jewel. *Gem stone:* A precious stone; a mineral suitable for cutting as a gem."
>
> (*Century.*) "*Gem:* 2. A precious stone of any kind, as the diamond, ruby, topaz, emerald, etc.; especially

when cut and polished for ornamental purposes; a jewel. *Gem stone:* A precious stone; a gem.

"Jewel: A precious stone or gem; especially a gem cut and shaped for ornament or use, as the *jewels* of a crown." (*Century.*)

This is the primary definition, and the subordinate ones regard any piece of jewel work, like a bracelet or a brooch, or any ornament like the decoration of an honorary order, and the stones used in watch making, and the projecting bosses in colored-glass windows, as jewels, beside the metaphorical use of the term.

"A precious stone fashioned for use or beauty; a gem, especially one set in precious metal for personal adornment.

"Precious Pearles and *Jewels* and farre more precious Truth are found in muddy shells and places. (Roger Williams * * *)" (*Standard.*)

Under the adjective *precious* in the *Century*, *precious stone* is defined as "a stone distinguished for its beauty and rarity and prized for use in ornamentation, especially in jewelry; a gem; a jewel." The definition quotes from Mr. Kunz's book entitled Gems and Precious Stones of North America, as follows:

Beauty of color, hardness, and rarity are the essential qualities which entitle a mineral to be called precious. Strictly speaking, the only precious stones are the diamond, ruby, sapphire, and emerald, though the term is often extended to the opal, notwithstanding its lack of hardness, and to the pearl, which is not a mineral, but strictly an animal product.

It may be suggested here that the case is something like that of precious metals, in which, as is shown by the *Century* in the same paragraph, upon the metal test of

precious in reference to standard of value and coinage only gold and silver strictly are precious metals, although there are more valuable metals, and the term is sometimes extended even in practical affairs to platinum and mercury. So in the case of stones, not every stone which is beautiful and valuable and somwhat rare and used for ornamentation should be called a precious stone; only the top members of the series by all these tests and the additional tests, such as purity, brilliancy, and hardness, should be so included.

The *Standard* does not define precious stone, but refers to the title *Stone*, where appears a list of precious and ornamental stones, and among other abbreviated explanations the letter P stands for precious stones and S for semiprecious stones. The only varieties marked as "precious" in this table are the following: The alexandrite variety of chrysoberyl, the diamond, the emerald, the opal, the ruby, the sapphire, and the turquoise; while the beryl and cat's-eye, the garnet—both carbuncles and the pyrope variety (the most valuable)—the aquamarine and the moonstone and topaz are entered as semiprecious. The pearl is not included at all, and certain inferior quartzes like agate, and anomalous articles like amber, are entered as gem stones, while crocidolite, along with Mexican onyx, tiger's-eye, and alabaster are noted as ornamental stones.

The fluctuating or inexact use of the three terms "gem," "jewel," and "precious stone," which are roughly synonymous in common speech, is shown by a reference to the article Gems in the Encyclopædia Britannica, from which it is evident that the word originally and properly refers to stones, including inferior materials which were cut, not as more commonly in modern times by facets similar to the natural angles in crystallography, but by engraving of seals in the form of diesinking, and later in figures and designs in low relief. The Egyptian scarab and the

intaglio and cameo were gems, and the materials of all the ancient nations ranged from jasper and agate to alabaster, quartz, and glazed clay. It seems that there was a progressive development of the art and an improvement ultimately in the materials selected, although during the period of excellency in Greece the material is of indifferent quality, just as in the older specimens, brilliant color and translucency not being then a necessary element, and the design being worked out solely with a view to its own artistic merit. Indeed, the plate accompanying the article shows that many of these gems were engraved on ancient pastes.

The article on "Mineralogy" of the Encyclopædia Britannica further illustrates the contention that not every rare, beautiful, and valuable stone is to be regarded as a precious stone, and a changing range of colors appears by which, while each stone has its normal or characteristic color, many of the varieties pass through the whole chromatic range. For instance, under the oxides of metals appears (Encyc. Brit., 9th ed., vol. 16, p. 386) the spinel and balas ruby, which are often sold as the true ruby, but are not so valuable, one of a certain size being half the price of a diamond of that size. There is a violet-colored member of the division and also one that is orange red. Associates in the group, like sapphirine and the others named, are sapphire blue, greenish or reddish blue, bluish black, grass green, and colorless. On the same page the chrysoberyl is spoken of as a very desirable gem, and when chatoyant (oriental chrysolite) is of extreme value. I suggest, however, that this is by no means to be confounded with the ordinary cat's-eye or tiger-eye. Under the quartzes (p. 389) the varieties include rock crystal, amethyst, and cairngorm stone, which are valued as ornamental stones. "Those which follow are less so." And then follow among others the "cat's-eye, inclosing asbestus." Among the common quartzes

are some impure varieties which are properly rocks, and included in these is the jasper; while "other siliceous minerals seem intimate mixtures of quartz and opal, as * * * chalcedony, carnelian * * * chrysoprase, apple-green, * * * moss agate * * * (called bloodstone when sprinkled with deep red spots). Among the impure marbles (p. 397) is verde antique mixed with green serpentine, and malachite is described on page 399; "the finer varieties are prized for ornamental purposes." The turquoise, page 405 (given as precious in the Standard Dictionary list), "is valued as an ornamental stone, but is destroyed by oil and deteriorated by soap." The finest topazes (page 408) are the blue * * * the pink, the yellow * * * and the colorless." The tourmaline (a stone which is prized, but certainly not precious) has (p. 409) "crystals, ruby red within, surrounded by green or red at one extremity and green at the other, also blue and pink;" while the euclase (id.), although "transparent, splendent, vitreous," and of various shades, and not affected by acids, can not be used as a gem on account of its brittlenesss. The garnet group is described on page 411 and the important varieties distinguished, but nothing said of its value in the gem character further than statements that one variety when polished is called the hyacinth and the red varieties when cut *en cabochon* are termed carbuncles. There is a "noble serpentine" (p. 414), and serpentine "forms whole rocks and mountains and is manufactured into various ornamental articles." Under the title of *emerald* on page 418 appears, beside that precious stone, the beryl or aquamarine, "colorless or less brilliant" than emerald, and the common beryl, with the remark that emerald and beryl are much valued as precious stones.

Under the feldspar group (p. 419) it is said that "the adularia or moonstone and the green amazon stone are cut as ornamental stones."

I may add that in this list under the mineral resins appears amber, which (something like the animal pearl, though the latter does not appear in the encyclopedia's article on mineralogy) is by a sort of anomaly classed among minerals, although it is derived "chiefly from an extinct coniferous tree and found in the * * * diluvial formations of many countries." The encyclopedia article is followed by an index of mineral species (p. 429) for convenience of reference.

Leisure Hours Among the Gems, by Augustus C. Hamlin, fellow of the American Association for the Advancement of Science, member of the Royal Society of Antiquaries of Northern Europe, etc., Boston, James R. Osgood & Co., 1884, contains four sections, as shown by the table of contents, devoted only to the diamond, the emerald, the opal, and the sapphire. It appears that the ruby is really a red sapphire (p. 407 et seq.; p. 425), and that often stones of inferior material, like corundum, tourmaline, or spinel, when of fine hues of red, are classed as rubies or red sapphires. Page 406 contains the following sentence, which illustrates certain of the statements previously made in this brief: "This celestial jewel was formed of green jade stones of delicate color, perforated and strung upon a cord, to the center of which was attached a monster red stone of the nature of which we were not informed."

On the other hand, in Castellani's book, Gems, London, Bell & Daldy, 1871, he gives a long list of valuable and ornamental stones, seems to distinguish the four most precious stones as *oriental* gems, and by the seven well-defined tests of quality gives a list of eighteen, which includes not only the first four members, but the pearl, garnet, and aquamarine. The topaz will perhaps fall under the heading chrysolite (pp. 14, 15, 68, 215). And on pages 142 and 152 he refers to the moonstone and the cat's-eye. In the epilogue (p. 240) he

speaks of amber as among precious substances belonging to the vegetable kingdom, which are used ornamentally, and ivory, coral, and pearl as belonging to the animal kingdom and so used.

(Cf. Dana's Text Book of Mineralogy, ed. of 1898, under "Index of Species," p. 579, "garnet," "moonstone," "topaz," etc.)

I have already referred *ante* to the definition of precious stone on page 310 of Mr. Kunz's book, Gems and Precious Stones of North America: New York, Scientific Publishing Company, 1892. The chapter in which that occurs begins with the question, What is a precious stone? and mentions the shifting standard due to the caprice of fashion. Following the definition he says:

> Popularly, a gem is a precious or semiprecious stone, especially when cut or polished for ornamental purposes. Mineralogically, the term * * * includes the semiprecious or fancy stones, such as the chrysoberyls, alexandrites, tourmalines, spinel, and topaz. Archæologically, the term is restricted to engraved stones, such as intaglios and cameos. The term jewel is applied to a gem only after it has been mounted.

He gives the epithet "phenomenal" to those stones which, like the opal, moonstone, and cat's-eye, exhibit a play of color or show a line or band of light, and notes that public interest in semiprecious stones has greatly increased during recent years. (Id., p. 311.)

[End of Appendix.]

O